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RECOVERY FOR GOODS SOLD BY AN ILLEGAL COMBINATION. — A highway robber may safely retain his partner's share of the booty, for the law leaves parties to an illegal transaction in the situation it finds them.¹ The robber is thrown out of court, not because he is a professional law-breaker,² but because he is attempting to enforce an unlawful agreement. To justify withholding legal redress, then, from an applicant "trust," it must not only appear that the plaintiff is or represents a combination created and usually acting in illegal restraint of trade, but the particular right sued on must have arisen from, be incidental to, or directly further, the illegal scheme.³ Thus, that the plaintiff is a "trust" is no defense to suits for infringement of a patent,⁴ to foreclose a mortgage,⁵ to enforce a surety liability,⁶ to recover possession of property once acquired under an unlawful contract,⁷ to reach the proceeds of sales in the hands of an agent,⁸ and to recover for services rendered,⁹ and for goods sold.¹⁰ Apparently it is not sufficient that the con-

¹ *Everet v. Williams*, 9 L. Quar. Rev. 105, 197.

² *Taylor v. Bell Soap Co.*, 45 N. Y. Supp. 939. But *cf.* *Jackson v. Akron Brick Assoc.*, 53 Oh. St. 303, where the statute permitting a partnership to sue in its own name was construed not to include an illegal partnership.

³ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

⁴ *Strait v. Nat'l Harrow Co.*, 51 Fed. 819; *Gen'l Electric Co. v. Wise*, 119 Fed. 922; *Am. Soda Fountain Co. v. Green*, 69 Fed. 333.

⁵ *Dickerman v. Northern Trust Co.*, 176 U. S. 181.

⁶ *Globe, etc., Co. v. Leach*, 19 Ky. L. Rep. 1287.

⁷ *Cal. Cured Fruit Assoc. v. Stelling*, 141 Cal. 713.

⁸ *McCausland Bros. v. Akers*, 24 Oh. Circ. Ct. R. 711.

⁹ *The Chas. E. Wiswall*, 86 Fed. 621.

¹⁰ *Connolly v. Union Sewer Pipe Co.*, *supra*; *Nat'l Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; *Wiley v. Nat'l Wall Paper Co.*, 70 Ill. App. 543. See *Chattanooga, etc., Works v. Atlanta*, 203 U. S. 390, 397.

tract alleged to be invalid (to restrict the discussion to contracts) was made in the course of the trust's usual business, however unlawful the trust or the business; the contract requires more direct contact with illegality to be tainted.¹¹

Some light on this necessarily vague topic is thrown by a recent holding of the Supreme Court. The plaintiff trust had contracted with the defendant jobber to sell, and the jobbing company had agreed to buy, all the wall-paper required by it in its business for a year, subject to prices and terms specified. The defendant gave several orders, which were filled, but when sued for the price pleaded illegality, and was sustained by a majority of the court. *Continental Wall Paper Co. v. Voight & Sons Co.*, U. S. Sup. Ct., Feb. 1, 1909. A previous holding⁸ is distinguished on the ground that there the purchaser was under no general contract to buy, and hence the specific sales sued on had no direct connection with an illegal contract or scheme. This distinction suggests two tests: that a contract will not be enforced when the plaintiff's case must disclose an unlawful transaction,¹² or when the contract is an inseparable part of such a transaction. The former has been justly criticized as too narrow;¹³ thus it is immaterial in the principal case that the plaintiff must refer to the previous unlawful contract for terms and prices, as is pointed out by the minority. But the minority opinion goes on broadly to state that a purchase may be lawful though it is the fulfilment of an unlawful contract, in other words, that the sales in question were not bad "from the outside." This is not the way the Supreme Court treats separate sales when the question is whether they constitute interstate commerce; then the single act is said to derive its flavor from the nature of the whole congeries.¹⁴ Perhaps a sale may constitute an element of actionable damage as a tortious act, and yet be in itself a valid contract.¹⁵ Nevertheless when, as in the principal case, the specific contracts were contemplated by, are the fulfilment of, and are connected as parts of an entire scheme to the previous unlawful agreement, it is hard to agree with the minority. The test of separability is indeed vague, but it seems certain enough to invalidate the contracts in question. On this ground, that the court could not help the plaintiff without furthering an illegal scheme,¹⁶ a trust was not allowed to sue for infringement of a patent,¹⁷ to replevy property,¹⁸ or to recover the price of goods sold.¹⁹ Nor should the court in deciding the legality of such contracts of sale consider the irrelevant facts that the plaintiff will have no quasi-contractual alternative,²⁰ that the defendant has received the benefits,²¹ or that an innocent defendant might recover against the trust in the converse case.²²

¹¹ Wald's Pollock, Contracts, 3d ed., 490, *n.* 50; 1 Page, Contracts, § 540.

¹² Robson v. Hamilton, 41 Ore. 239; Springfield Insurance Co. v. Hull, 51 Oh. St. 270.

¹³ Wald's Pollock, Contracts, 497, *n.* 56. See Johnson v. Hulings, 103 Pa. St. 498.

¹⁴ Montague & Co. v. Lowry, 193 U. S. 38; Swift & Co. v. United States, 196 U. S. 375; Aikens v. Wisconsin, 195 U. S. 194.

¹⁵ See Chattanooga, etc., Works v. Atlanta, *supra*.

¹⁶ Cf. Thomson v. Thomson, 7 Ves. 470; Snider v. Udell Woodenware Co., 74 Miss.

353.

¹⁷ Nat'l Harrow Co. v. Hench, 84 Fed. 226; Same v. Quick, 67 Fed. 130.

¹⁸ Bishop v. Am. Preservers Co., 157 Ill. 284.

¹⁹ Arnot v. Pittston, etc., Coal Co., 68 N. Y. 558; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232. Cf. Carrington v. Callier, 2 Stew. (Ala.) 175.

²⁰ Scott v. Brown, etc., Co., [1892] 2 Q. B. 724.

²¹ Contra, Nat'l Wall Paper Co. v. Hobbs, 90 Hun (N. Y.) 288.

²² Carter-Crume Co. v. Peurrung, 86 Fed. 439. But cf. Clancey v. Onondaga, etc., Co., 62 Barb. (N. Y.) 395.